Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 2000

BOISE CASCADE CORPORATION, a Delaware corporation,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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January 25, 2001

3600

QUESTIONS PRESENTED

1. Whether respondent's regulatory order forcing petitioner to submit to the physical occupation of its timberland by northern spotted owls constituted a physical taking of petitioner's property for which just compensation is due.

2. Whether petitioner's regulatory takings claim, which arose when respondent issued a self-described "Final Order" denying petitioner's application for a timber harvesting permit, was rendered "unripe" merely because petitioner did not seek a completely different kind of permit from a *separate federal agency* that lacked authority to authorize the harvesting under state law.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Petitioner Boise Cascade Corporation is a Delaware corporation that is a publicly traded company on the New York Stock Exchange. There is no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF APPENDICES vi

TABLE OF AUTHORITIES vii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 6

A. Procedural History 6

B. The Case 8

REASONS FOR GRANTING THE PETITION 11

I. This Case Involves Two Important Constitutional Questions That Should Be Resolved by This Court 11

A. Under a Physical Occupation Theory the Test Is Whether the Landowner Has the Right to Exclude Wildlife, Not Whether the State Has Control Over It. 12

B. A State May Not Require a Landowner to Obtain a Permit from a Federal Agency in Order to Satisfy "Ripeness," When It Is Under No Obligation to Issue Its Own Permit, Even if the Federal Permit Is Granted. 14

II. The Petition Should Be Granted Because the Decision Below Conflicts with Decisions of This Court and Other Federal and State Courts 20

CONCLUSION 22

TABLE OF APPENDICES

Appendix	Document
A	*Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry*, 991 P.2d 563 (Or. App. 1999).
B	Order of Oregon Court of Appeals dated March 15, 2000, in *Boise Cascade Corp. v. Board of Forestry* (CA A100855), denying reconsideration of its prior decision reported at 991 P.2d 563.
C	Order of the Oregon Supreme Court dated October 24, 2000, in *Boise Cascade Corp. v. Board of Forestry*, ___ P.2d ___ (SC S47459), denying petition for review.
D	Letter Opinion dated October 16, 1997, of the Clatsop County Circuit Court (No. 93-2018) denying Petitioner summary judgment on its possessory takings claim, and granting summary judgment on the issue of liability on Petitioner's regulatory takings claim.
E	Jury Verdict dated November 21, 1997, in *Boise Cascade Corp. v. Board of Forestry* (Clatsop County Circuit Court No. 93-2018), finding the State liable on Petitioner's *Loretto* claim and making findings on the compensation issues.
F	Judgment of the Clatsop County Circuit Court in *Boise Cascade Corp. v. Board of Forestry*, No. 93-2018, entered on April 30, 1993.
G	*Boise Cascade Corp. v. Board of Forestry*, 886 P.2d 1033 (Or. App. 1994).

H	*Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 411 (Or. 1997).
I	Appellate Judgment in *Boise Cascade Corp. v. Board of Forestry*, (CA A78968, A79458, SC S47459), entered on December 15, 2000.
J	Oregon Administrative Rule 629-665-0210 (2000), formerly numbered 629-024-0809.
K	Oregon Administrative Rule 629-680-000 (2000), formerly numbered 629-056-0010.
L	Oregon Administrative Rule 629-680-0010(5) (2000), formerly numbered 629-056-0020(5).
M	Oregon Administrative Rule 629-680-0100(1) (2000), formerly numbered 629-056-0100(1).
N	Oregon Administrative Rule 629-680-0220 (2000), formerly numbered 629-056-0220.
O	USF&WS *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl* ("Guidelines"), dated July 1990.
P	USF&WS Memorandum issued October 2, 1991, rescinding Guidelines.
Q	Memorandum Order of the U.S. District Court for the District of Columbia dated February 27, 1992, regarding USF&WS's recission of the Guidelines.
R	Final Order of Bureau of Forestry ("BOF") dated January 19, 1993, affirming the State Forester's denial of Boise Cascade's amended plan for timber harvest.

S — Letter dated October 15, 1997, from the Oregon Department of Forestry to counsel for Boise Cascade.

T — Judgment entered by Clatsop County Circuit Court on December 24, 1997, in favor of Boise Cascade in the amount of $1,820,059, plus prejudgment interest.

U — Letter from the BOF's counsel to the USF&WS dated June 16, 1992, and cited in the BOF's Final Order (App. R) as indicating that Oregon law would not be satisfied if the USF&WS were to issue a decision finding that an Incidental Take Permit ("ITP") under the Endangered Species Act was not required.

V — Order of Oregon Court of Appeals in *Boise Cascade Corp. v. Board of Forestry* (CA A100855) dated January 6, 2000, granting in part Boise Cascade's Motion for Reconsideration.

W — Injunction Order dated July 28, 1997, in *United States v. Coast Forest Res. Ltd. P'ship*, U.S.D.C. Or. Civil No. 96-1575-HO, 2000 WL 298707 enjoining another timber owner because there was a spotted owl activity center approximately one mile away from the harvest site.

X — Complaint filed in *State of Oregon v. Int'l Paper Co.*, U.S.D.C. Or. Civil No. 93-6223-HO, dated July 1993.

Y	Letter dated December 10, 1997, from the federal government to counsel for Boise Cascade suggesting that Petitioner should apply for an ITP.
Z	Decree and Judgment entered on October 15, 1998, by the United States District Court for the District of Oregon in *Boise Cascade Corporation v. Michael J. Spear*, No. 97-1810-JO, granting the federal government an injunction prohibiting Petitioner from cutting any trees on its property unless it first obtained an ITP.
AA	Letter from the federal government's counsel to Boise Cascade dated July 30, 1999, concluding that the site had been abandoned by the owls, and notifying Boise Cascade that the government would not oppose dissolving the existing injunction.

TABLE OF AUTHORITIES

Page

CASES

Babbitt v. Sweet Home, 515 U.S. 687 (1995) 15, 18

Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942) 21

Boise Cascade Corp. v. Board of Forestry, 886 P.2d 1033 (Or. App. 1994) 2, 6-8

Boise Cascade Corp. v. Board of Forestry, 935 P.2d 411 (Or. 1997) 2, 7, 8

Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry, 991 P.2d 563 (Or. App. 1999) 1, 3, 9, 10

Boise Cascade Corp. v. Board of Forestry, 331 Or. 244, ___ P.3d ___ (Or. Oct. 24, 2000) 10

Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) 12, 21

City of Monterey v. Del Monte Dunes of Monterey, Ltd., 526 U.S. 687 (1999) 15

Defenders of Wildlife v. Bernal, 204 F.3d 920 (9th Cir. 2000) 15

First English Evangelical Lutheran Church v. County of Los Angeles, Cal., 482 U.S. 304 (1987) 15, 20

Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc., 636 So. 2d 761 (Fla. Dist. Ct. App.), *review denied*, 645 So. 2d 452 (Fla. 1994) 12, 21

Kaiser Aetna v. United States, 444 U.S. 164 (1979) . . . 11, 12

Page

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 1, 12

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 1, 15, 20

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 15

Moerman v. State, 21 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993) 21

North Dakota v. United States, 460 U.S. 300 (1983) . . . 11, 13

Palazzolo v. State ex rel. Tavares, 746 A.2d 707 (R.I. 2000), *cert. granted*, 69 U.S.L.W. 3257 (Oct. 10, 2000) 22

Shellnut v. Ark. State Game & Fish Comm'n, 258 S.W. 2d 570 (Ark. 1953) 21

Sierra Club v. State Bd. Of Forestry, 876 P.2d 505 (Cal. 1994) 12

Sierra Club v. Department of Forestry & Fire Protection, 26 Cal. Rptr. 2d 338 (Cal. Ct. App. 1993) 12, 21

Southview Associates, Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992) 13, 21

State of Oregon v. Int'l Paper Co., U.S.D.C. Or. Civil No. 93-6223-HO 17

State v. Herwig, 117 N.W.2d 335 (Wis. 1962) 21

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 19, 20

Page

United States v. Coast Forest Res. Ltd. P'ship, U.S.D.C. Or. Civil No. 96-1575-HO, 2000 WL 298707 17

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 14, 15

Yee v. City of Escondido, 503 U.S. 519 (1992) 12, 13

STATUTES AND RULES

16 U.S.C.A. § 1531 *et. seq.* West 1985 & Supp. 2000) . . . 3, 5, 6, 9, 12, 15, 17, 18

28 U.S.C.A. § 1257(a) (West 1993) 2

28 U.S.C.A. § 2101(c) (West 1994) 2

U.S. Const. amend XIV 3, 4

U.S. Const. amend V 3, 5, 8

U.S. Const. art. VI 2

Supreme Court Rule 10(b) 11

Supreme Court Rule 10(c) 11

Or. Rev. Stat. §§ 271.715(1), 271.725(1) (1999) 12

Oregon Administrative Rule 629-665-0210 (2000) 4, 6, 7, 10, 3, 15, 16, 20

Oregon Administrative Rule 629-680-0000 (2000) 5

Oregon Administrative Rule 629-680-0010 (2000) 5

Oregon Administrative Rule 629-680-0100 (2000) 5

Page

Oregon Administrative Rule 629-680-0220 (2000) 5

Oregon Constitution 8

OTHER AUTHORITIES

Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan. L. Rev. 305 (1997) 16

Daniel A. Hall, *Using Habitat Conservation Plans to Implement the Endangered Species Act in Pacific Coast Forests: Common Problems & Promising Precedents*, 27 Envtl. L. 803 (1997) 16

Endangered & Threatened Wildlife & Plants, 55 Fed. Reg. 26,114 (Fish & Wildlife Serv. June 26, 1990) 6

Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl 6, 7, 17

PETITION FOR WRIT OF CERTIORARI

Petitioner Boise Cascade Corporation ("Petitioner" or "Boise Cascade") respectfully petitions for a writ of certiorari to review a judgment on the decision of the Oregon Court of Appeals, reversing a jury verdict and judgment entered in Petitioner's favor in the Circuit Court for Clatsop County before the Honorable Paula J. Brownhill, Judge.

OPINIONS BELOW

The decision of the Oregon Court of Appeals of *Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry*, is reported in 991 P.2d 563 (Or. App. 1999), and is reproduced as Appendix A ("App. A"). A copy of that court's March 15, 2000 order (CA A100855) denying reconsideration and affirming its prior decision is reproduced as Appendix B ("App. B"). The Oregon Supreme Court's October 24, 2000 order denying Petitioner's petition for review (SC S47459) is reproduced as Appendix C ("App. C"). The letter opinion of the Clatsop County Circuit Court (No. 93-2018) denying Petitioner summary judgment on its possessory takings claim, based on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982), and granting summary judgment on the issue of liability on its regulatory takings claim based on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), is reproduced as Appendix D ("App. D"). The jury verdict finding State of Oregon ("the State") liable on Petitioner's *Loretto* claim and making findings on the compensation issues is reproduced as

Appendix E ("App. E"). The circuit court's judgment is reproduced as Appendix F ("App. F").

Prior to the trial, there was another set of appeals after the case originally had been dismissed by the Clatsop County Circuit Court. The Oregon Court of Appeals' opinion on the prior appeal, which reversed the trial court, is reported in *Boise Cascade Corp. v. Board of Forestry*, 886 P.2d 1033 (Or. App. 1994) and is reproduced as Appendix G ("App. G"). In that instance, at the State's request, the Oregon Supreme Court granted review and affirmed in part and reversed in part the court of appeals. The Oregon Supreme Court's opinion is reported in 935 P.2d 411 (Or. 1997) and is reproduced as Appendix H ("App. H").

STATEMENT OF JURISDICTION

The order of the Oregon Supreme Court denying Petitioner's petition for review of the decision of the Oregon Court of Appeals was issued on October 24, 2000. (App. C.) The appellate judgment was entered on December 15, 2000, and is reproduced as Appendix I ("App. I"). This petition is being timely filed within 90 days of entry of that judgment. 28 U.S.C.A. § 2101(c) (West 1994). The Court has jurisdiction in this matter pursuant to 28 U.S.C.A. § 1257(a) (West 1993), because the Oregon regulatory scheme as enforced by the Oregon court is repugnant to the Supremacy Clause and the Fifth and Fourteenth Amendments to the U.S. Constitution.

The Oregon Court of Appeals vacated a judgment based upon a jury verdict which found that Petitioner's rights under the Takings Clause had been violated because a state regulation required Petitioner to submit to an occupation of its property as a spotted owl nesting site. In vacating this judgment, the court of appeals ruled as a matter of law that this Court's decision in *Loretto* did not apply because "[t]he state has no control over where spotted owls choose to nest." (App. A; 991 P.2d at 570.) The Oregon Court of Appeals also overturned the circuit court's ruling that Petitioner was entitled to summary judgment on its *Lucas* claim. The appellate court held that the *Lucas* claim was not "ripe" for adjudication because Petitioner had not attempted to obtain an Incidental Take Permit ("ITP") pursuant to the Endangered Species Act of 1973 ("ESA"), 16 U.S.C.A. § 1531, *et seq.* (West 1985 & Supp. 2000) from the U.S. Fish & Wildlife Service ("USF&WS"), which, if granted, would have given the Oregon Board of Forestry ("BOF") discretion to approve Boise Cascade harvesting its timber. 991 P.2d at 572-73.

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provisions at issue in this case are the Takings or Just Compensation Clause of the Fifth Amendment, which provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

It is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The Petitioner was prohibited from harvesting timber on its property based upon Oregon Administrative Rule 629-665-0210 (2000), formerly numbered 629-024-0809, the pertinent parts of which provide:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> (a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
>
> (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site . . . .

> (2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding . . . .
>
> . . . .
>
> (5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

This Rule is reproduced in its entirety as Appendix J ("App. J"). Also involved are Oregon Administrative Rules 629-680-0000 (2000), formerly 629-056-0010; 629-680-0010(5) (2000), formerly 629-056-0020(5); 629-680-0100(1) (2000), formerly 629-056-0100(1); and 629-680-0220 (2000), formerly 629-056-0220, which declare, define and together provide for the protection of such sites as public resources. Each of these rules is reproduced in Appendices K through N, respectively ("App. K," "App. L," "App. M," "App. N").

The USF&WS is authorized to issue an ITP for the "taking" of a threatened species under section 9 of the ESA, 16 U.S.C.A. § 1539 (West 1985 & Supp. 2000).

STATEMENT OF THE CASE

A. Procedural History.

In June 1990, the USF&WS indicated it intended to list the northern spotted owl as a threatened species under the ESA. On July 23, 1990, that listing took effect. Endangered & Threatened Wildlife & Plants, 55 Fed. Reg. 26,114 (Fish & Wildlife Serv. June 26, 1990). At the same time, the USF&WS issued *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl* ("Guidelines"), requiring the preservation of 70 acres of timber around the northern spotted owl nest sites. A copy of the Guidelines is reproduced as Appendix O ("App. O").

Based on those Guidelines, the BOF adopted the former Oregon Administrative Rule 629-024-0809(1) and (2) (renumbered now at 629-665-0210(1) and (2) (2000) (*see* App. J)), requiring private landowners to also protect a 70-acre area around a nest site or an activity center to be "occupied by an adult pair of spotted owls, capable of breeding." Or. Admin. Rule 629-665-0210.

Prior to the time the owls were listed, Petitioner had in 1988 acquired a 65-acre parcel of timber as a part of a land trade with another forest products company. That parcel is known as the Walker Creek Unit (the "Unit"). (App. G; 886 P.2d at

1035.) In 1989, Petitioner cleared a road into the Unit in anticipation of full-scale logging of the timber the following year. However, when the owls were listed in 1990, Petitioner stopped cutting trees in the Unit.

In October 1991, the USF&WS rescinded its Guidelines as the result of a legal action challenging them. A copy of the memorandum rescinding the Guidelines is reproduced as Appendix P ("App. P"), and the Memorandum Order of the U.S. District Court for the District of Columbia pertaining to the recission of the Guidelines is reproduced as Appendix Q ("App. Q").

In February 1992, Boise Cascade filed in compliance with Oregon law a written plan with the Oregon State Forester ("State Forester") seeking permission to harvest the subject timber. (App. G; 886 P.2d at 1036.) That plan was denied by the State Forester based on Or. Admin. Rule 629-665-0210. The Forester indicated that Petitioner needed to protect approximately 56 acres of timber on its land as spotted owl nesting habitat (the other 14 acres comprising the core area were on adjacent lands owned by the State and another private landowner). On May 5, 1992, Boise Cascade submitted an amended plan that was also denied, because it refused to acquiesce in designating 56 acres of its land as a public resource as a nesting site for the owls. 886 P.2d at 1036. It then appealed that denial to the BOF, which affirmed the State Forester's denial of the plan in a "Final Order" on January 19, 1993, a copy of which is reproduced as Appendix R ("App. R"). Boise Cascade then sought review of

the agency's order by the Oregon Court of Appeals, which affirmed the BOF's Final Order on December 7, 1994. (App. G; 886 P.2d at 1041.) That order was then also affirmed by the Oregon Supreme Court on April 10, 1997. (App. H; 935 P.2d 411.)

B. The Case.

After the BOF issued its Final Order, Boise Cascade commenced an inverse condemnation action against the State in Clatsop County Circuit Court alleging a "taking" of its timber under the Fifth Amendment to the U.S. Constitution and a similar provision in the Oregon Constitution. The State then filed a motion to dismiss on various grounds, including that Petitioner had failed to allege facts sufficient to state a claim under the Fifth Amendment. The circuit court granted the State's motion on all grounds, and Petitioner appealed to the Oregon Court of Appeals.

The court of appeals reversed on all grounds, holding that valid takings claims were alleged under both the Fifth Amendment and the Oregon Constitution. (App. G; 886 P.2d 1033.) The State then sought review by the Oregon Supreme Court, which was granted. The Oregon Supreme Court affirmed that Petitioner had alleged a valid takings claim for the 56 acres of timber it had been prevented from logging. The court reversed as to a temporary takings claim, involving another four acres located outside the protected nesting site, that Petitioner had been delayed in harvesting because of a temporal restriction.

(App. H; 935 P.2d at 411, 420 n.14.) The court remanded the case to the circuit court for trial. (App. H.)

After remand, Petitioner filed an amended complaint that separated its claim based on the Fifth Amendment into two counts. The first was a physical occupation theory based on *Loretto*, and the second was a regulatory takings theory based on *Lucas*. Petitioner then moved for summary judgment as to the issue of liability on both counts of its federal claim. (App. A; 991 P.2d at 563 and 569.)

On October 15, 1997, the Oregon Department of Forestry informed Boise Cascade by letter that "of the pair that previously occupied the Walker Creek site, the female was found dead last winter, and the male was recently observed at [another] site more than eight miles away." The letter is reproduced as Appendix S ("App. S"). *See also* 991 P.2d at 565. The letter went on to inform Petitioner that the State considered the nest site to be no longer protected under Oregon law, but suggested Petitioner consult with the USF&WS because that agency might consider the site to still be protected under the ESA. (App. S.) The following day, the circuit court issued a letter opinion granting Petitioner summary judgment on its *Lucas* count and denying its summary judgment on its *Loretto* count. *See* 991 P2d at 565.

Petitioner then filed a Supplemental Complaint alleging a temporary taking for the almost five years that it had been denied the right to harvest the 56 acres of timber because of the Oregon regulation. At the conclusion of the trial, the circuit court

submitted the issue of liability as to Petitioner's *Loretto* count to the jury. A unanimous jury found that "plaintiff Boise Cascade Corporation [was] required to submit to a physical occupation of its property as a result of the Board of Forestry's Order." (App. E.) It also made findings as to the fair market value of the timber both at the time the Final Order was entered denying Petitioner the right to harvest the timber and the date the State declared the site to have been abandoned by the owls. (*Id.*) As a result of those findings, a judgment was entered in the amount of $1,820,059, including interest from the date of the taking (the court of appeals' opinion incorrectly states that the judgment was for $2,279,223). (App. A; 991 P.2d at 565.) A copy of that judgment is reproduced as Appendix T ("App. T").

The State appealed. The Oregon Court of Appeals reversed the judgment, holding that Petitioner could not state a claim for the occupation of its land, based upon *Loretto*, because "[t]he State has no control over where spotted owls chose to nest." (App. A; 991 P.2d at 570.) It also reversed the summary judgment on the count based on *Lucas*. The court held that Petitioner's regulatory takings claim was not "ripe" for adjudication because there was the possibility that if Boise Cascade had applied to the USF&WS for an ITP and one had been granted, the BOF could have exercised its discretion under Or. Admin. Rule 629-665-0210(5) (2000) to approve Petitioner's logging plan. The Oregon Supreme Court then denied review. 331 Or. 244, ___ P.3d ___ (Or. Oct. 24, 2000).

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10(b) lists among the considerations governing review on certiorari the circumstance in which a state court of last resort has decided a federal question in a way that conflicts with the decision of a federal court of appeals. In this case the decision was rendered by a lower appellate court and the state court of last resort refused to grant review. (App. C.) Under Rule 10(c), a ground for review exists when a state court has decided an important question of federal law that has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court. All of these grounds for review are present in this case.

I. This Case Involves Two Important Constitutional Questions That Should Be Resolved by This Court.

The precedent established below is the latest in a growing number of cases arising out of government regulations that require property owners to leave their land in its natural condition so that it can be occupied as wildlife habitat and, at the same time, denies the property owner compensation for the imposition of a wildlife servitude. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (involving a navigational servitude.) These are the same type of wildlife servitudes that the federal government regularly acquires by eminent domain. *See North Dakota v. United States*, 460 U.S. 300 (1983). Oregon law does

not authorize the state to use its power of eminent domain for that purpose. Or. Rev. Stat. §§ 271.715(1), 271.725(1) (1999).

A. Under a Physical Occupation Theory the Test Is Whether the Landowner Has the Right to Exclude Wildlife, Not Whether the State Has Control Over It.

The court below shifted the focus of this Court's physical takings jurisprudence from the issue of whether there had been a forced occupation authorized by government, to whether government had control over the occupant, which this Court has never deemed to be the determining factor. *Loretto*, 458 U.S. at 432 n.9; *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). In a physical takings case, the key issue is whether the landowner has the right to exclude the government-authorized occupant and has been forced to acquiesce to the occupation. 503 U.S. at 527; *Kaiser Aetna*, 444 U.S. at 176. Due to the ESA and state regulations that impose similar wildlife servitudes, there are a growing number of cases in which government has imposed wildlife servitudes. Courts have refused to find a taking and award compensation. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (*see* opinion of Justice White dissenting); *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. Dist. Ct. App.), *review denied*, 645 So. 2d 452 (Fla. 1994). In *Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal. Rptr. 2d 338 (Cal. Ct. App. 1993), the California Supreme Court affirmed the lower court, 876 P.2d 505 (Cal. 1994), but omitted any

discussion of the takings issue and took the extraordinary step of directing that the lower court's opinion not be published in the official reports. No. S037820, 1994 Cal. LEXIS 1388 (Cal. Mar. 18, 1994).

Here, the subject regulation goes beyond merely regulating the use of Petitioner's land by requiring that Petitioner use it for only one purpose. *Yee*, 503 U.S. at 522-23. It prohibits Petitioner from conducting any activity on its property that "cause[s the] owls to flush from the nesting site." Or. Admin. Rule 629-665-0210(1)(b) (2000). Petitioner had no choice under the subject regulation but to acquiesce to the occupation of its timber as a nesting site. 503 U.S. at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." (emphasis in original)). In *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 94 (2d Cir. 1992), the Second Circuit held that there had been no taking because the landowner could exclude from its property the wildlife (deer) that the state sought to protect and log "the entire 44 acres of critical softwood in the deeryard." By contrast, Petitioner was prevented by the subject regulation from harvesting its timber or doing anything that could cause the birds to "flush from the nesting site." The State consequently exerted as much control over Petitioner's property as if it had acquired a formal easement. Or. Admin. Rule 629-665-0210(1)(b); *cf. North Dakota*, 460 U.S. 300. Petitioner was prevented from excluding the owls from its property.

B. A State May Not Require a Landowner to Obtain a Permit from a Federal Agency in Order to Satisfy "Ripeness," When It Is Under No Obligation to Issue Its Own Permit, Even if the Federal Permit Is Granted.

The second important issue involves satisfying the ripeness requirement before adjudicating a regulatory takings claim. If the decision below is left to stand, a state administrative agency could avoid making a final decision satisfying ripeness, by unfairly requiring the landowner to pursue a collateral approval from a federal agency that has no authority to either approve or disapprove the petitioner's logging plan. In this case, even if Petitioner had obtained an ITP from the USF&WS, the state agency was under no obligation under Oregon law to exercise its discretion so as to approve Petitioner's logging plan.

"Ripeness" is satisfied when "the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985). The BOF's Final Order certainly did that. Under the BOF's own regulation, it had no discretion but to deny Petitioner the right to harvest 56 acres of merchantable timber, unless Petitioner obtained an ITP for the owls from the USF&WS. Moreover, the BOF did not base its decision on the possibility that it might, in the future, approve Petitioner's logging plan, if Boise Cascade obtained an ITP. In fact, the BOF's Final Order (App. R) cites a letter from its counsel to the USF&WS, reproduced as

Appendix U ("App. U"), indicating that Oregon law would not be satisfied if the USF&WS were to issue a decision finding that an ITP was not required. Likewise, potential future exercise of discretion by the BOF allowing Petitioner to log its timber based upon an ITP from the USF&WS would not bar a temporary takings claim based on the BOF's Final Order. Until that Final Order was reversed, a taking was occurring. *Lucas*, 505 U.S. at 1012-13; *First English Evangelical Lutheran Church v. County of Los Angeles, Cal.*, 482 U.S. 304 (1987). The granting of an ITP, and a waiver based upon it, would have merely turned a permanent taking into a temporary one.

Under *Williamson County*, a landowner is not required to seek review from another agency that does not have the authority to participate in the decision-making process. 473 U.S. at 193. The USF&WS had no authority to authorize logging; its only concern under the ESA is to prevent the owls from being harmed. *Babbitt v. Sweet Home*, 515 U.S. 687 (1995). By requiring Petitioner to apply for an ITP under the ESA, the State was imposing a requirement as a condition for its approval that does not exist under federal law. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000).

Nor, as this Court subsequently stated in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 n.7 (1986), can government require "unfair procedures in order to" satisfy ripeness. Trying to obtain an ITP from the USF&WS under the exception provision in Or. Admin. Rule 629-665-0210(5) would have been both unfair and an exercise in futility. *City of*

Monterey v. Del Monte Dunes of Monterey, Ltd., 526 U.S. 687, 698-99 (1999).

It would have been unfair because the ITP process would likely have added years to the administrative process and required conservation measures far broader than those needed for the owls nesting in Petitioner's timber. *See* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan. L. Rev. 305, 326, 335 (1997) ("Property owners repeatedly voice dismay over their almost Kafkaesque inability to reach closure under the ESA."); and Daniel A. Hall, *Using Habitat Conservation Plans to Implement the Endangered Species Act in Pacific Coast Forests: Common Problems & Promising Precedents*, 27 Envtl. L. 803, 805 (1997) (The USF&WS requires as a part of a Habitat Conservation Plan that is part of the ITP process that landowners not only protect habitat for the subject species of the ITP, but for "all species which might ever reside on the property"). Likewise, even if an ITP were issued, the BOF was not required to approve Petitioner's logging plan. There is no reason to believe the BOF would have waived protecting the site so long as the owls occupied the site. Or. Admin. Rule 629-665-0210(5); (App. J).

It would have been an exercise in futility, because the record on appeal clearly indicates that if Petitioner had sought an ITP from the USF&WS in 1993, before the BOF's Final Order, the USF&WS would not have issued an ITP.

After the Oregon Court of Appeals issued its opinion reversing the judgment in Petitioner's favor, Boise Cascade

moved for reconsideration. In asking the court to reconsider its holding that Petitioner's regulatory takings claim was not "ripe," Boise Cascade moved to supplement the record concerning what had occurred after the BOF had issued its Final Order and the case had been pending in the courts for over six years. That motion was granted in part in an order reproduced as Appendix V ("App. V").

That record shows that shortly before the State deemed the Boise Cascade nest site to have been abandoned, the USF&WS obtained an injunction against another timber owner because there was a spotted owl activity center approximately one mile away from the harvest site (a mile's distance is well beyond the 70-acre core area protected under state law). *United States v. Coast Forest Res. Ltd. Pship*, U.S.D.C. Or. Civil No. 96-1575-HO, 2000 WL 298707 (Order dated July 28, 1997 at 1). A copy of that order is reproduced as Appendix W ("App. W"). That injunction was not lifted until almost three years later when, after monitoring the owls' movements by radiotelemetry, the USF&WS failed to prove that logging the subject timber would have any significant impact upon them. 2000 WL 298707 at *5. Also while this action was pending before the Oregon courts, the State brought a legal action against the USF&WS alleging that it had threatened to take legal action against the State and its employees, pursuant to the ESA, if they failed to enforce the Guidelines that the USF&WS had been forced to rescind. *State of Oregon v. Int'l Paper Co.*, U.S.D.C. Or. Civil No. 93-6223-HO (Complaint dated July 1993 at 4). A

copy of that Complaint is reproduced as Appendix X ("App. X").

Shortly after the State, in October 1997, declared the nest site on Petitioner's land to have been abandoned, Boise Cascade submitted, and the State Forester approved, a new logging plan to harvest the 56 acres that had previously been protected. Petitioner, through its counsel, also inquired of the USF&WS whether it still considered the site to be protected under the ESA due to the death of the female owl and the abandonment of the nesting site by the male owl. Counsel for the federal government responded by indicating that the USF&WS did still consider the nesting site to be occupied and suggested Boise Cascade apply for an ITP if it desired to harvest its timber. A copy of the federal government's December 10, 1997 letter is reproduced as Appendix Y ("App. Y"). Petitioner then commenced an action in the United States District Court for the District of Oregon against the USF&WS, seeking a declaratory judgment that the site was no longer occupied and was, therefore, no longer protected under the ESA. *Sweet Home,* 515 U.S. 687. The federal government filed a counterclaim seeking an injunction barring Petitioner from logging its timber because the USF&WS did not consider the nest site to have been abandoned. The district court granted the government an injunction prohibiting Petitioner from cutting any trees on its property unless it first obtained an ITP for the owls. A copy of the district court's decree and judgment is reproduced as Appendix Z ("App. Z").

As a result of the injunction, Petitioner submitted an application for an ITP to the USF&WS, along with a Habitat Conservation Plan for the Unit. In August 1999 the USF&WS also came to the conclusion that the site had been abandoned and notified Boise Cascade that it would not oppose dissolving the injunction. A copy of that letter is reproduced as Appendix AA ("App. AA"). This was two years after the State had declared the site to have been abandoned. Over nine years elapsed between the time the State adopted its regulations that prevented Petitioner from logging its timber and the date the federal injunction was lifted. The law does not require the doing of a useless act in order to satisfy ripeness.

The BOF's Final Order clearly defined the impact of the regulation on Petitioner's property: it was prevented from making any economic use of 56 acres of merchantable timber. Once the BOF issued its Final Order there was no question about how the subject regulations applied to the particular land in question. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997). At that point there was no permissible economic use of the timber subject to the restriction. The BOF had no discretion under its own rule but to deny Petitioner's logging plan, unless Petitioner was successful in the future in obtaining an ITP for the owls from the USF&WS. Moreover, as this Court stated in *Suitum*, Petitioner's "takings claim [cannot] be kept at bay from year to year * * *" on the remote possibility that the USF&WS would grant an ITP, which in turn would allow the BOF to exercise its discretion and approve Petitioner's

logging plan. *Id.* at 741. Such a rule, as adopted by the subject regulation and approved by the courts below, would allow the State "to stultify the Fifth Amendment's guarantee." *Id.*

This Court's prudential ripeness doctrine is based on the fact that land use boards usually have a "high degree of discretion" in applying a law to a parcel of property. *Id.* at 738. However, the BOF was not applying a land use regulation, and it had no discretion under Or. Admin. Rule 629-665-0210, but to deny Petitioner the right to log the area surrounding the spotted owl nest site. Even if Petitioner had applied for an ITP after the BOF had issued its Final Order in 1992, that would not have barred Petitioner's claim for compensation for a temporary takings claim for the period it was prevented from logging its property. *First English*, 482 U.S. 304; *Lucas*, 505 U.S. 1003. If the USF&WS had denied an ITP, the BOF had no authority to reverse its Final Order and allow Petitioner to log its property. Or. Admin. Rule 629-665-0210(5). While if the ITP was granted, the BOF was also under no obligation to reverse its Final Order and allow Petitioner to log its property. *Id.*

II. The Petition Should Be Granted Because the Decision Below Conflicts with Decisions of This Court and Other Federal and State Courts.

The Oregon Court of Appeals' reversal of the "takings" judgment entered here after trial is contrary to the basic physical taking jurisprudence of this Court as stated in *Loretto*, *Yee* and *Kaiser Aetna*. There is, however, a split among the lower courts

in cases involving wildlife over whether a property owner can sustain a claim based on a physical takings theory. The better reasoned cases focus on whether the property owner has the right under the subject law to exclude the animals from its land. If not, the forced occupation imposes a wildlife servitude. *Southview Associates*, 980 F.2d 84; *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942) ("If the Government wishes to do more in the way of protecting migratory birds than prohibiting their slaughter, * * * it must acquire some proprietary interest in the areas suitable for such uses."); *State v. Herwig*, 117 N.W.2d 335, 340 (Wis. 1962) (holding that in order to protect bird nesting habitat on private land "the state should acquire whatever rights or easements are needed by purchase, lease or condemnation"); *Shellnut v. Ark. State Game & Fish Comm'n*, 258 S.W.2d 570, 574 (Ark. 1953) (taking of private property for a wildlife refuge); *Moerman v. State*, 21 Cal. Rptr. 2d 329, 333-34 (Cal. Ct. App. 1993) (holding that there was no taking under *Loretto* because the landowner had the right to exclude elk from his property).

In conflict with this line of cases, are those such as the decision below that avoid the exclusion analysis, and hold that there was no forced occupation that constituted a taking because the State has no control over wildlife. *See also Christy*, 857 F.2d 1324; *Fla. Game & Fresh Water Fish Comm'n*, 636 So.2d 761; *Sierra Club*, 26 Cal. Rptr. 338.

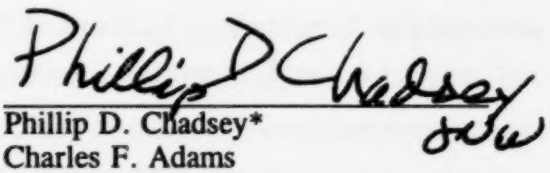
As pointed out above, the Oregon courts have raised hurdles to satisfying prudential ripeness requirements that go far

beyond this Court's takings jurisprudence. *Cf. Palazzolo v. State ex rel. Tavares*, 746 A.2d 707 (R.I. 2000), *cert. granted*, 69 U.S.L.W. 3257 (Oct. 10, 2000).

CONCLUSION

Petitioner respectfully urges the Court to grant the Petition for Writ of Certiorari.

Dated this 25th day of January, 2001.



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